

## CALIFORNIA COASTAL COMMISSION

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### CALIFORNIA COASTAL COMMISSION

### FEDERAL CONSISTENCY IN A NUTSHELL

A Guide concerning the Operation of the  
Federal Consistency Provisions  
of the  
Coastal Zone Management Act of 1972  
as Amended

Adapted from a Publication by

OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT

United States Department of Commerce

National Oceanic and Atmospheric Administration

FEDERAL CONSISTENCY IN A NUTSHELL

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## **I. GENERAL DEFINITIONS**

### **STATE AGENCY**

Legal Authority:  
CZMA Sec. 306(d)(6)  
15 CFR Sec. 930.18

For all of the California Coast, except the San Francisco Bay, the "State agency" responsible for implementing Coastal Zone Management Act (CZMA) is the California Coastal Commission (Commission). (In the San Francisco Bay Area, the administering agency is the San Francisco Bay Conservation and Development Commission.) The Commission is responsible for reviewing proposed federal and federally authorized activities to assess their consistency with the approved state coastal management program.

### **MANAGEMENT PROGRAM**

Legal Authority  
CZMA Sec. 304(12)  
15 CFR Sec. 930.19

The Commission has developed the California Coastal Management Program (CCMP), pursuant to the requirements of the CZMA. The key policy component of the CCMP is the California Coastal Act of 1976, as amended (Division 20, Cal. Pub. Resources Code (PRC)).

### **COASTAL ZONE**

Legal Authority:  
CZMA Sec. 304(1)

The term "coastal zone" means the coastal zone delineated in a State's management program (for California, see PRC Section 30103). All lands held in trust by or whose uses are subject solely to the discretion of the federal government are excluded from the coastal zone. If activities on excluded lands affect the coastal zone, they must be reviewed for consistency with the CCMP.

### **ASSOCIATED FACILITIES**

Legal Authority:  
15 CFR Sec. 930.21

"Associated facilities" include all forms of development that are directly related to the federal action or federally permitted action. The proponent of a federal action or federally authorized action must consider whether the action and its associated facilities satisfy the relevant consistency requirements of the CZMA. An example of an associated facility would include a proposed pipeline connection that must be constructed to meet the needs of a proposed federal waste treatment facility. An example of non-associated facilities would include recreational boating facility that is induced by but not necessarily related to a federal harbor-dredging project.

## **II. DIRECT FEDERAL ACTIVITIES/DEVELOPMENT PROJECTS** **CZMA Sections 307 (c)(1) & (2) [16 USC Section 1456(c)(1) & (2)]** **15 CFR Subpart 930-C**

### **TYPE OF ACTION**

Legal Authority:  
15 CFR Sec. 930.31

A **Federal Activity** is any federal action that is not defined as a license or permit, or assistance. For example, a management plan for federal land would be a federal activity triggering consistency review, if the plan's policies affect the coastal zone.

Legal Authority: 15 CFR Sec.  
930.31(b)

A **Federal Development Project** includes any federal activity involving the planning, construction, modification, or removal of public works facilities or other structures, and the acquisition, utilization, or disposal of land or water

resources.

The federal regulations define federal development projects as a subset of federal activities, and thus federal activities and development projects are subject to the same substantive and procedural requirements under the consistency review provisions of the CZMA.

Legal Authority:  
CZMA Sec. 307(c)(1)

Any of these federal actions, whether it occurs inside or outside of the coastal zone, that affect any land or water uses or natural resources of the California coastal zone is subject to the federal consistency provisions of the CZMA.

### **NOTIFICATION**

Legal Authority:  
15 CFR Sec. 930.34(b)

A federal agency planning to undertake an activity likely to affect the coastal zone must notify the Commission of the proposal at least **90 days** before final approval of the federal action.

### **CONSISTENCY DETERMINATION**

Legal Authority:  
15 CFR Sec. 930.39(c)

The federal agency notification must include a statement indicating that the proposed action will be undertaken in a manner that is consistent to the maximum extent practicable with the CCMP.

Legal Authority:  
15 CFR Sec. 930.32

The term **consistent to the maximum extent practicable** means that federal activities must be fully consistent with the CCMP unless existing law prohibits compliance. In addition, deviations from full consistency are justified when unforeseen circumstances arising after the approval of the management program present the federal agency with a substantial obstacle that prevents complete adherence to the approved program.

Legal Authority:  
15 CFR Sec. 930.39

The federal agency's consistency determination must be based upon an **evaluation** of the relevant provisions of the CCMP. The consistency determination must include a **detailed description** of the proposed activity, its associated facilities, and their combined coastal effects, and **any information** necessary to support the federal agency's conclusion.

Federal agencies are strongly encouraged to obtain the assistance of the Commission staff in preparing a consistency determination.

### **NEGATIVE DETERMINATION**

Legal Authority:  
15 CFR Sec. 930.35(d)

A federal agency may decide that a consistency determination is not required either because the activity is the same or similar to a past activity previously approved by the Commission or because a thorough assessment establishes that there would be no effects upon the coastal zone. In such cases, the federal agency should submit a **negative determination** and supporting information to the Commission at least **90 days** before final approval of the activity.

## **COMMISSION REVIEW**

Legal Authority:  
15 CFR Sec. 930.41(a)

Each consistency determination is reviewed and acted upon by the Commission following preparation of a staff report, public notice, and a public hearing. The Commission is required to act on the consistency determination within **45 days** from receipt of the federal agency notification; otherwise, the federal agency may presume Commission agreement, except as noted below.

Legal Authority:  
15 CFR Sec. 930.41(b)

Commission agreement cannot be presumed if the Commission requests an extension of time for review. Federal agencies are required to approve one request for an extension period of not more than **15 days**. Approval of longer or additional extension requests is left to the discretion of the federal agency.

Legal Authority:  
15 CFR Sec. 930.42  
Reference: OCRM  
Comments to final  
p. 37149

In an event the **Commission disagrees** with the federal agency's consistency determination, the Commission must describe the reasons for the disagreement and alternative measures, if they exist, that would make the activity consistent with the CCMP. The Commission can also object to a consistency determination by finding that a federal agency has not supplied enough information to assess the activity's consistency with the CCMP. In either of these instances, the federal agency and the Commission should utilize the remaining portion of the 90-day notification period to attempt to resolve their differences. In cases of continuing disagreement, federal agencies are encouraged to suspend implementation of the proposed activity beyond the 90-day notification period pending resolution of the disagreement. When faced with a disagreement, federal agencies are encouraged to reassess their consistency determination in light of the Commission's response.

## **CONFLICT RESOLUTION**

There are several procedures that can be used in the event of a disagreement regarding a consistency determination or a negative determination.

Legal Authority:  
15 CFR Sec. 930.111

First, **the Office of Ocean and Coastal Resource Management (OCRM) encourages informal discussion between the parties.** OCRM is available to assist in these discussions.

Legal Authority:  
15 CFR Sec. 930.43

Second, either the federal agency or the Commission may request **mediation** by the Secretary of Commerce. If the mediation process is agreed to by both the federal agency and the Commission, a hearing officer will hold a public hearing to gather information on the disagreement, and the hearing record will be transmitted to the Secretary of Commerce. The Secretary must then schedule a mediation conference to be attended by the disagreeing agencies

Third, if mediation efforts are unsuccessful, or are simply not utilized, either party may resort to judicial action to resolve the serious disagreement. **Judicial review** may be sought without first having exhausted the mediation process.

Legal Authority:  
Subchapter 11, p. 90  
Combined FEIS & CCMP,  
August, 1977

The Commission has limited regulatory authority over federal activities or development projects. A Commission objection to a consistency determination does not result in a veto of the proposed project. A federal agency may continue with a proposed project even though the Commission has objected to the consistency determination. However, the CCMP requires federal agencies to inform the Commission in writing of any such action.

Legal Authority:  
CZMA Sec. 307(c)(1)(B)

The 1990 amendments to the Coastal Zone Management Act provide for a presidential exemption for activities found to be inconsistent with the CCMP. If the Commission has objected to a consistency determination by a federal agency and the federal courts uphold that objection, the President may, upon written request from the Secretary of Commerce, exempt that federal activity from compliance with the CCMP. In order to make such an exemption, the President must determine that the activity is in the paramount interest of the United States.

### III.

#### **FEDERAL LICENSES AND PERMITS** **CZMA Section 307(c)(3)(A) [16 USC Section 1465(c)(3)(A)** **15 CFR Subpart 930-D**

#### **TYPE OF ACTION**

Legal Authority:  
15 CFR Sec. 930.51

The federal licenses and permits referred to in CZMA Section 307(c)(3)(A) include any authorization, certification, approval, or other form of permission that any federal agency is empowered to issue to an applicant.

Legal Authority:  
15 CFR Sec. 930.52

An **applicant** includes any individual or organization, except a federal agency, who files an application for federal license or permit

#### **NOTIFICATION**

Legal Authority:  
15 CFR Sec. 930.53

The Commission has included in the State's coastal management program a **list** identifying federal license and permit activities that reasonably can be expected to affect the coastal zone (attached). This list has been provided to federal agencies that must, in turn, make the information available to applicants. The list may be changed from time to time.

Legal Authority:  
15 CFR Sec. 930.54

In addition, the Commission monitors unlisted federal license and permit activities. Unlisted permit and license activities are subject to federal consistency review if NOAA determines they are reasonably expected to affect land or water uses or natural resources of the coastal zone.

Legal Authority:  
CZMA Sec. 307(c)(3)(A)  
15 CFR Sec. 930.53(e)  
and Sec. 930.54(d)

No federal license or permit listed in the CCMP or permits identified through the monitoring process may be issued by the federal agency until the Coastal Commission concurs with a consistency certification prepared by the applicant.

#### **CONSISTENCY CERTIFICATION**

Legal Authority:  
15 CFR Sec. 930.57(a)

In order to comply with the federal consistency requirements of the CZMA, the applicant must provide, in the application to the federal agency, a **certification** of consistency.

Legal Authority:  
15 CFR Sec. 930.57(b)

The certification must include the following statement: *The proposed activity complies with California's approved coastal zone management program and will be conducted in a manner consistent with such program.*

Legal Authority:  
15 CFR Sec. 930.57(a)  
and Sec. 930.58

A copy of the certification must also be provided to the Commission along with necessary data and information. The supporting information shall include a copy of the federal permit application, a detailed description of the proposal, a brief assessment of the probable effects on the coastal zone, and a brief set of findings indicating that the proposed activity, its associated facilities, and their effects, are all consistent with the provisions of the CCMP.

Legal Authority:  
15 CFR Sec. 930.58(b)

The Commission staff is available to provide assistance for developing the consistency certification

### **COMMISSION REVIEW**

Legal Authority:  
15 CFR Sec. 930.60

Commission **review begins** at the time the Commission receives the applicant's consistency certification and all necessary data and information. Following receipt of this material, the Commission must ensure timely review of the proposed activity. Commission staff prepares a staff report and recommendation for Commission action. After public notice, the Commission, during a public hearing, makes a decision to concur with or object to the consistency certification.

Legal Authority:  
15 CFR Sec. 930.63(a)

**At the earliest practicable time**, the Commission must notify the applicant and federal agency of its decision. Concurrence by the Commission is **conclusively presumed** in the absence of an objection and (c) within **six months** following commencement of Commission review.

Legal Authority:  
15 CFR Sec. 930.63(b)

If the Commission has not issued a decision within **three months**, it must notify the applicant and federal agency of the **status** of the matter and the basis for further delay.

Legal Authority:  
15 CFR Sec. 930.64(b)

In the event the **Commission objects** to the applicant's consistency certification, it must describe any alternative measures, if they exist, that would allow the Commission to concur. The Commission and (d) can also object to a consistency certification by finding that the applicant has not supplied enough information to assess the activity's consistency with the CCMP. In either event, a Commission objection must include a statement informing the applicant of a right of appeal to the Secretary of Commerce on the grounds described below. Following receipt of a Commission objection to a consistency certification, the federal permitting agency cannot issue the license or permit, except as provided below.

Legal Authority:  
15 CFR Sec. 930.65

### **CONFLICT RESOLUTION**

There are a number of procedures that can be used when a disagreement regarding a consistency certification arises.

Legal Authority:  
15 CFR Sec. 930.111

First, **informal discussions** among the parties are recommended. OCRM is available to assist in these discussions. When faced with a Commission objection, applicants are encouraged to re-examine their proposals in light of Commission action.



Legal Authority:  
15 CFR Subpart 930-H

Next, the applicant may **appeal** a Commission objection to the Secretary of Commerce within 30 days from receipt of the objection. Copies of the appeal must be sent to the federal agency and the Commission.

Legal Authority:  
15 CFR Subpart 930-H

The Secretary of Commerce can override a Commission objection if he or she determines that the proposal is **consistent with the objectives or purposes of the Federal Coastal Zone Management Act or is necessary in the interest of national security**. (These requirements are explained in detail at 15 CFR 930.121-2.)

Legal Authority:  
15 CFR Subpart 930-H

If the Secretary overrides the Commission's objection the federal agency may approve the activity; otherwise the federal agency is prohibited from issuing the permit.

IV. **OUTER CONTINENTAL SHELF (OCS) ACTIVITIES**  
**CZMA Section 307(c)(3)(B) [16 USC Section 1456 (c)(3)(B)**  
**15 CFR Subpart 930-E**

**TYPE OF ACTION**

Legal Authority:  
15 CFR Sec. 930.73

The activities covered by CZMA Section 307(c)(3)(B) are **exploration, development, and production** of oil or gas from any area that has been leased under the **Outer Continental Shelf (OCS) Lands Act** (43 U.S.C. Section 1331 et seq.). In general, these activities include plans of exploration (POEs) and development and production plans (DPPs).

**NOTIFICATION**

Legal Authority:  
15 CFR Sec. 930.76

A consistency certification must be provided with any POE or DPP, affecting the California coastal zone, that has been submitted to the Department of Interior. That agency will furnish the Commission with a copy of the OCS plan (excluding proprietary information) and the consistency certification. No federal license or permit activity described in detail in an OCS plan may be approved by a federal agency until the requirements of the CZMA are satisfied

**CONSISTENCY CERTIFICATION**

Legal Authority:  
15 CFR Sec. 930.76(c)

A consistency certification for any OCS activity affecting the coastal zone shall include following language: *The proposed activities described in detail in this plan comply with the California Coastal Management Program and will be conducted in a manner consistent with such program*

Legal Authority:  
15 CFR Sec. 930.77

**Supporting information** to accompany the certification must include the comprehensive offshore, nearshore, and onshore **data and material required by** the Department of the Interior's operating **regulations governing exploration, development and production operations on the OCS** (see 30 CFR Section 250.34) and regulations pertaining to the Interior OCS **information program** (see 30 CFR Part 252). The supporting information

must also include a brief assessment of the probable coastal zone effects, and a brief set of findings indicating that the proposed activities, their associated facilities, and their combined effects, are all consistent with the provisions of the management program. Any draft or final environmental impact statement should also be included. The Commission staff will, upon request, provide assistance in preparing a consistency certification.

### **COMMISSION REVIEW**

Legal Authority:  
15 CFR Sec. 930.78

Commission **review begins** at the time the Commission receives the OCS plan, consistency certification, **and** adequate supporting information. Following receipt of this material, the Commission must ensure timely **public notice**, and must hold one or more **public hearings**.

Legal Authority:  
15 CFR Sec. 930.79

**At the earliest practicable time**, the Commission must notify the applicant, the Assistant Administrator of NOAA, and the federal agency of its response to the consistency certification. If the Commission issues a concurrence, it must notify the applicant, the Assistant Administrator, and the Secretary of the Interior.

Legal Authority:  
15 CFR Sec. 930.79(a) and (b)

If the Commission has not issued a decision within **three months** following the beginning of review, it must notify the applicant and the Department of the Interior of the **status** of the matter and the basis for further delay or **be conclusively presumed to concur**. Concurrence by the Commission shall be conclusively presumed in the absence of an objection within **six months** following commencement of Commission review.

Legal Authority:  
15 CFR Sec. 930.80

If the Commission concurs with the consistency certification, additional submittals will not be required for subsequent federal permit applications for activities described in detail in the OCS plan. The lessee or operator must, however, supply the Commission with copies of permit applications to allow the Commission to monitor the approved OCS activities. Further, if regulatory actions by any other agency result in substantial modification of the plan, renewed consistency review of the modified plan will be required.

Legal Authority:  
15 CFR Sec. 930.79(c)

In the event the **Commission objects** to an OCS plan, its objection must describe how the activity is inconsistent with the CCMP and alternative measures, Legal Authority: if any, that would allow for Commission concurrence.

Legal Authority:  
15 CFR Sec. 930.81

The Commission can also object to a consistency certification by finding that the applicant has not supplied enough information to assess activity's consistency with the CCMP. A Commission objection must also include a statement informing the applicant of a right of appeal to the Secretary of Commerce on the grounds described below. Following receipt of a Commission objection, federal agencies may not issue any of the licenses or permits for activities described in detail in the OCS plan, except as provided below.

## **CONFLICT RESOLUTION**

There are a number of procedures that can be used when a disagreement regarding an OCS plan certification arises.

Legal Authority:  
15 CFR Sec. 930.111

First, **informal discussions** among the parties (Department of the Interior, the Commission and the OCS lessee or operator) are recommended. OCRM is available to assist in these discussions. When faced with a Commission objection, lessees and operators are encouraged to adopt amended or new OCS plans that conform to alternative strategies proposed by the Commission.

Legal Authority:  
15 CFR Subpart 930-H

Next, the applicant may **appeal** the Commission's objection to the Secretary of Commerce within 30 days from receipt of the Commission's objection. Copies of the appeal must be sent to the Department of the Interior and the Commission.

Legal Authority:  
15 CFR Subpart 930-H

The Secretary of Commerce can override a Commission objection if he or she determines that the OCS activities are **consistent with the objectives or purposes of the Federal Coastal Zone Management Act or is necessary in the interest of the national security**. (These requirements are explained in detail at 15 CFR 930-121-2.)

Legal Authority:  
15 CFR Sec. 930.83

If the Secretary overrides the objection, the Department of the Interior may approve the OCS plan and issue permits; otherwise, the applicant must and Sec. 930.84 submits an amended or new OCS plan to the Interior Department and to the Commission, along with a new consistency certification and supporting information. Commission review will begin again, except that the applicable time period for purposes of concurrence by conclusive presumption will be three months instead of six months.

## **VI. FEDERAL ASSISTANCE CZMA SECTION 307(d) [16 USC SECTION 1456(d)] 15 CFR Subpart 930-F**

### **TYPE OF ACTION**

Legal Authority:  
15 CFR Sec. 930.91

The term "Federal assistance" means assistance provided under a federal program to state or local governments (applicant agencies) through grant or contractual arrangements, loans, subsidies, guarantees, insurance, or other forms of financial aid.

### **NOTIFICATION**

Legal Authority:  
15 CFR Sec. 930.93

The Commission must be notified of the federal assistance application through the State Clearinghouse process (Executive Order 12372).

## **COMMISSION REVIEW**

Legal Authority:  
15 CFR Sec. 930.94

The State Clearinghouse (SCH) must ensure that the Commission is afforded an opportunity to review proposed federal assistance projects. If during the SCH process, the Commission does not object to the proposal, the federal agency may grant the assistance.

Some federal agencies have adopted regulations in connection with their funding programs to assure timely implementation of the federal consistency review process.

Legal Authority:  
15 CFR Sec. 930.96(c), (d), and (e)

In the event the **Commission objects** to the agency's proposal, its objection must describe how the activity is inconsistent with the CCMP and describe alternative measures, if any, that would allow for Commission concurrence. The Commission can also object to an application for federal assistance by finding that the applicant agency has not supplied enough information to assess the activity's consistency with the CCMP. The Commission must then notify the applicant agency and the federal agency of the objection and inform the applicant agency of its right to appeal to the Secretary of Commerce on the grounds described below. Following receipt of the Commission objection, the federal agency may not grant the federal assistance except as provided below.

## **CONFLICT RESOLUTION**

There are a number of procedures that can be used when a disagreement arises regarding the consistency of a federal assistance proposal.

Legal Authority:  
15 CFR Sec. 930.111

First, **informal discussions** among the parties (federal agency, Commission, and applicant agency) are recommended. OCRM is available to assist in these discussions. When faced with a Commission objection, applicant agencies are encouraged to re-examine their proposals in light of Commission remarks, particularly when the Commission suggests alternative strategies.

Legal Authority:  
15 CFR Subpart 930-H

Next, the applicant agency may **appeal** the Commission objection to the Secretary of Commerce within 30 days from receipt of the Commission's objection. Copies of the appeal must be sent to the federal agency and the Commission.

Legal Authority:  
15 CFR Subpart 930-H

The Secretary can override a Commission objection if he or she determines that the proposal is **consistent with the objectives or purposes of the Federal Coastal Zone Management Act or is necessary in the interest of the national security**.

Legal Authority:  
15 CFR Subpart 930-H

If the Secretary overrides the objection, the federal agency may grant the assistance; otherwise, the federal agency is prohibited from providing the financial aid.

	<u>Consistency Determination</u>	<u>Consistency Certification</u>	<u>Consistency Certification (OCS)</u>	<u>Consistency Certification (Federal Support)</u>
<u>CZMA Section</u>	1456(c)(1) & (2) (Subpart C)	1456(c)(3)(A) (Subpart D)	1456(c)(3)(B) (Subpart E)	1456(d) (Subpart F)
<u>Federal Action</u>	Federal Activities including development projects	Federally licensed and permitted activities	Federally licensed and permitted activities described in detail in OCS plans	Federal Assistance to State and local governments
<u>Coastal Zone</u>	Activities inside or outside of the coastal zone affecting land or water uses or natural resources of the coastal zone	Activities inside or outside of the coastal zone affecting land or water uses or natural resources of the coastal zone	Activities inside or outside of the coastal zone affecting land or water uses or natural resources of the coastal zone	Activities inside or outside of the coastal zone affecting land or water uses or natural resources of the coastal zone
<u>Responsibility to Notify State agency</u>	Federal agency proposing the action	Applicant for federal license or permit	Person submitting OCS plan	State Clearinghouse receiving State or local government application for federal assistance
<u>Notification Procedure</u>	Alternatives chosen by federal agency (subject to NOAA regulations)	Consistency certification as part of or attached to application sent to Federal agencies	Consistency certification attached to OCS plan, DOI transmits to State	State Clearinghouse notification procedure
<u>Consistency Requirement</u>	Consistent to the maximum extent practicable with CZM Program	Consistent with the CZM Program	Consistent with the CZM Program	Consistent with the CZM Program
<u>Consistency Finding</u>	Made by Federal agency (Review by Coastal Commission)	Made by Coastal Commission	Made by Coastal Commission	Made by Coastal Commission

	<u>Consistency Determination</u>	<u>Consistency Certification</u>	<u>Consistency Certification (OCS)</u>	<u>Consistency Certification (Federal Support)</u>
<u>Federal agency responsibility following a disagreement</u>	Federal agency not required to disapprove action following State agency disagreement(unless judicially impelled to do so)	Federal agency may not approve license or permit following State agency objection	Federal agency may not approve Federal licenses or permits described in detail in the OCS plan following State agency objection	Federal agency may not grant assistance following State agency objection
<u>Administrative Conflict resolution</u>	Mediation by the Secretary (Subpart G)	Appeal to the Secretary by applicant or Secretarial review (Subpart H)	Appeal to the Secretary by person or independent Secretarial review (Subpart H)	Appeal to the Secretary by applicant, agency or independent Secretarial review (Subpart H)